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NO.

In The
Supreme Court of the United States
August, 1987

COMMONWEALTH OF PENNSYLVANIA
Petitioner

vs

JOHN NELSON,
Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF PENNSYLVANIA

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Erie, Pennsylvania 16507
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TABLE OF STATUTES OR REGULATIONS INVOLVED

42 Pa. C.S.A. §9711(d)(8)

42 Pa. C.S.A. §9711(h)(3)

42 Pa. C.S.A. §9711(h)(3)(i)

F.R.C.P. S. Ct. Rule 17

STATEMENT OF THE CASE

The respondent was convicted by an Erie County jury of first degree murder for the homicide of his estranged wife. Thereafter, a sentencing hearing was held during which the Commonwealth presented evidence of aggravation as required by 42 Pa. C.S.A. §9711 et. seq. specifically the Commonwealth attempted to show that the killing was perpetrated by means of torture, 42 Pa. C.S.A. §9711(d)(8). Thereafter, the Court charged the jury during which the Trial Judge discussed the relevant law. However, the Judge failed to define for the jury the aggravating circumstance of torture.

This failure by the Court was preserved in the Lower Court and then argued before the Pennsylvania Supreme

Court. And, then, on April 3, 1987, the Pennsylvania Supreme Court filed an opinion and order in which the judgement of death was vacated and the case remanded for imposition of a life sentence. The Court cited as the reason for this decision that the Trial Court's failure to define the aggravating circumstance of torture resulted in an insufficient charge and created a possible arbitrary application.

Reargument was denied per curiam by the Court. The Petition for Writ of Certiorari from that denial followed.

SUMMARY OF ARGUMENT

The argument in support of the Petition for Certiorari is without arguable merit, and fails to include any supporting authority. Rather, the petitioner creates imaginative questions for this Court's consideration; however, even in the petitioner's world of fantasy they are not legitimate issues for review.

The Pennsylvania Supreme Court examined one of Pennsylvania's statutes and determined that such statute was not vague; however, did decide that at least one word therein (torture) should have been defined. And, that the Court's failure to do so required that the sentence of death be vacated. Such action by the Court is appropriate review for a State Court and the

decision is not of Constitutional magnitude.

Further, the vacating of the sentence of death, although admittedly unsettling to the victim's family is not State action which would raise to discrimination against those survivors, nor could such action be considered a denial of equal protection of the laws.

The defendant and the survivors are not equally situated. And, even if they were, the act of a State Court in defining a word that spares a person's life as he sets on death row is most assuredly granting an equal right to those survivors should they ever be in a similar situation as the respondent.

The petitioner request must be denied.

ARGUMENT

The Federal Rules of Criminal Procedure, specifically Supreme Court Rule 17 (considerations governing review of Certiorari), provide as follows:

> Rule 17. Considerations governing review on certiorari
>
> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial

proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court, or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the (sic) the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

It is the position of the respondent that the instant matter is not a proper subject for review by this Honorable Court, because the questions presented do not fall within any of the enumerated reasons appearing in Rule 17 set forth entirely above. Pennsylvania's Supreme Court's decision to require definitional specificity is not within the parameters for certiorari. However, the petitioner has attempted to create a right of review by setting forth that the Pennsylvania Supreme Court's action in vacating the death penalty returned against the respondent violated the due process rights of the victim's survivors, and discriminated against them as well by allowing the respondent to live. And, even though there is an obvious absence

of supportive authority in the petitioner's argument, he/they still propose the following: when the Pennsylvania Supreme Court determined that the word torture, in its statute which allows the imposition of the death penalty, must be defined by the trial judge to insure that the death penalty is not arbitrarily imposed, it made an error of Constitutional magnitude. And, when the respondent's life was spared and when he was remanded for resentencing to life imprisonment, that the survivors were denied due process of the laws as well as the equal protection of the laws.

Such fantasy is beyond the enumerations of Rule 17 and must be outside the purview of this Court.

Pennsylvania's highest appellate Court examined a Pennsylvania statute, determined that, although not arbitrary, it was necessary to provide a consistent definition, for a word contained therein (torture), and to insure that such definition was provided to the trier of fact to prevent arbitrary application. Such state action is not a treatment of a Federal question, nor does it create a special important reason requiring certiorari. Rather, such action is the type of review that this Honorable Court has directed that states conduct when deciding Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980), wherein it was stated:

> It is the responsibility of the Courts to channel the sentencers discretion by clear objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing the death sentence.

Irrespective of Godfrey v. Georgia, supra., and in an attempt to support their immaginative theory, it appears the petitioner, in pages 7-13 of the petition for certiorari, is addressing the first question presented; however, the argument drifts from the question and towards the Court's action of requiring a definition of torture. The petitioner argues that Pennsylvania's death statute is not arbitrary, and therefore, a definition of its terms is unconstitutional, or that a definition of torture cannot be required because to

hold otherwise would conflict with the holding in Pursell, supra; and therefore, to require one is again an act of Constitutional magnitude. Neither position is of arguable merit, and therefore, the reason for the absence of any supportive authority. Thus their arguments must fail. Furthermore, they must fail because the petitioner misunderstands the requirements in Godfrey v. Georgia, Supra, and because the petitioner mistates the holding in Pursell 495, A.2d 183 (Pa. 1985). As shown hereinafter, this Court directs definitional clarity of State statutes by its Courts, and the Pennsylvania Supreme Court did require a definition in Pursell, supra., and did define it. The Court stated:

> "The word torture is generally understood as the infliction of a considerate amount of pain and suffering on a victim which is unnecessarily heinous, atrocious, or cruel, manifesting exceptional depravity."

Additionally, the Pennsylvania Supreme Court in Commonwealth v. Nelson, 523 A.2d 728 did not vary from its holding in Commonwealth v. Pursell, Supra, at 196, but rather distinguished it by saying:

> "The critical distinction between Pursell and the case at bar is that in Pursell the Trial Judge gave the jury a charge which contained a sufficiently guiding definition of the word torture..." The central element in our decision in Pursell is that we upheld the charge given by the Trial Judge regarding the meaning of torture."

The Court in Pursell, supra. never said torture should not be defined, but

rather that it is not so vague as to reach constitutional proportions. The Court said: "We agree that the word 'torture' even with its ductile quality does not present a vagueness question of constitutional proportions," Pursell, supra., at 196, and Nelson, supra. at 737.

Therefore, for the reasons set forth above, the Pennsylvania Supreme Court's decision to vacate the respondent's death sentence because the Trial Judge failed to define torture is properly within the purview of the State Courts and not a subject for this Honorable Court's review.

The Commonwealth/petitioner, surely recognizing the weakness in its initial argument, shifts the focus from the merits of the case, the failure of the

trial court to define the word torture, and towards the survivors of the crime victims. The petitioner asserting that the legislature, in passing this legislation which provides for remand for the imposition of a life sentence when the death penalty is vacated rather than remand for a subsequent sentencing hearing, committed an error of Constitutional magnitude because the survivors of the crime victims are being denied due process of the laws and denied equal protection of those same laws. However, the Commonwealth/ petitioner feels that the only way to rectify this is to reverse the Pennsylvania Supreme Court and to reinstate the death sentence, or to remand for a second sentencing hearing

rather than to strike the law as being unconstitutional.

Such an argument is not founded in reason nor is it supported by case law. You cannot equate due process between defendants and crime victims survivors. They are by no means similarly situated. However, each class has the same interest, that being to insure that the statute allowing for the imposition of the death penalty is not arbitrarily applied; and to insure that all members of society cannot be twice placed in jeopardy for the same offense. And to return for resentencing would be to place a defendant twice in jeopardy. The statute thus prevents such double jeopardy and protects us all.

Additionally, even if we assume a remand for a sentencing hearing would

not be double jeopardy, and even if we assume that this Court would be in agreement with the petitioner, at least in theory, this Court would be constrained to do no more than declare the statute to be unconstitutional, rather than to create a nonexisting right to proceed with a new sentencing proceeding such can only be done by Pennsylvania's legislature.

Finally, the petitioner argues that the Supreme Court of Pennsylvania in vacating the respondent's death sentence and remanding for the imposition of a life sentence, defeats the legislative intent of having a jury decide the penalty. If so, why did the legislature provide for remand for imposition of a life sentence after a death sentence is vacated when the statute was created, 42

Pa. C.S.A §9711(h)(3). The Court was following legislative intent by vacating the penalty and remanding for the imposition of a life sentence pursuant to 42 Pa. C.S.A. §9711(h)(3)(i) because it was determined that the sentence may have been a product of passion, or prejudice, or any other arbitrary factor. The potential existed for arbitrary application without a definition of the statute.

The Commonwealth's arguments that the survivors are denied due process or are the subject of invidious discrimination are without authority, challenge the imagination, and are not the subject of review for certiorari.

Any remand for a new sentencing hearing would be the creation of a new statute in Pennsylvania by this Court,

and then a retroactive application. Such is contrary to the functions of this Court (the highest Judiciary not the legislature).

Certiorari must be denied.

CONCLUSION

For the reasons outlined in the respondent's brief, the petitioner's petition for Writ of Certiorari should be denied. The Pennsylvania Supreme Court acted within its statutory authority by vacating the death sentence and remanding the respondent for imposition of the death penalty.

Additionally, for the reasons set forth hereinabove, the Constitutional issues are of no arguable merit.

Respectfully submitted,

by Dennis V. Williams
Dennis V. Williams

Dated: September 16, 1987